Dato' Sri Dr Muhammad Shafee Abdullah v Majlis Peguam (Bar Council)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01–49–01 OF 2014
TENGKU MAIMUN, AHMADI ASNAWI AND VERNON ONG JJCA
23 JULY 2015

Legal Profession — Professional discipline — Misconduct — Appellant found guilty of misconduct and fined for breaching Legal Profession (Publicity) Rules 2001 — Appellant alleged to have publicised himself and his practice in two articles of an interview with him published in newspaper — Bar Council alleged appellant's remarks went beyond scope of 'approved information' a lawyer could give in a media interview under r 2 of 2001 Rules — Whether appellant had in fact publicised his practice or merely responded to questions posed to him by interviewer — Whether Bar Council and Bar's Disciplinary Board and Committee failed to consider scope of journalist's questions to appellant, purpose of interview and message articles sought to convey

The respondent lodged a complaint with the disciplinary board ('the DB') under the Legal Profession Act 1976 ('the LPA') to investigate whether the appellant had breached the Legal Profession (Publicity) Rules 2001 ('the 2001 Rules') in an interview he gave a newspaper journalist. The disciplinary committee ('the DC') which enquired into the complaint concluded that the appellant had publicised himself and his legal firm in breach of various provisions under the 2001 Rules as well as under r 48 of the Legal Profession (Practice and Etiquette) Rules 1978 and the 2007 rulings of the Bar Council. The DC found the appellant guilty of misconduct under s 94(3)(k) and (o) of the LPA and recommended that he be fined RM5,000. On receiving notice from the DB that it had affirmed the DC's decision and was imposing the recommended fine, the appellant appealed to the High Court against the DB's decision. The interview of the appellant was published in two articles, the first of which contained the words 'high profile lawyer', 'top lawyer' and 'people had no difficulty finding the appellant's office (which had no signboard) because of the appellant's reputation'. The High Court found that those words were that of the journalist and not of the appellant. The second article contained two statements made by the appellant, viz: 'I can tell you that whenever I am a defence counsel, the AG's Chambers always sends, without a doubt, their best team against me. This is true' and 'I am an authority in election law and there are very few of us in this country. I am also one of the world's experts on extradition and mutual assistance cases'. The High Court held these two statements were laudatory remarks by the appellant about himself and his firm which went beyond the scope of 'approved information' an advocate and

A solicitor could divulge in an interview to the media under r 2 of the 2001 Rules. The High Court also held that the respondent's opinion under r 15(1)(b) of the 2001 Rules was the primary consideration insofar as it related to the question whether what was said in the interview reasonably gave rise to the inference the appellant was attempting to publicise his practice. In the instant appeal, the B appellant argued that (a) the words in the first article were not his statements but the journalist's own opinion; and (b) merely stating that one was a specialist or had an expertise in response to questions from a journalist was not publicity as the word 'publicise' in r 5 of the 2001 Rules meant 'to make known to the public through any form of advertisement'; that r 5 must refer to C advertisements made for the purposes of publicity; that there had to be an advertisement to promote the sale of that which was being advertised; that in this case there was no advertisement at all. Concerning the second article, the appellant submitted, inter alia, that the DC, DB and the High Court wholly failed to consider the testimony of the journalist, the scope of her questions, the D purpose of the interview and the general message the articles sought to convey. The respondent, on the other hand, argued that the appellant's description of himself as an authority and an expert were sufficient to be laudatory remarks which breached r 2 of the 2001 Rules. The respondent also argued that the court should be cautious in interfering with the DB's decision in the instant E appeal as the question of whether a particular conduct was unprofessional and unbecoming of an advocate and solicitor was primarily one for the members of the Bar to decide in accordance with standards established by members of the profession.

F **Held**, allowing the appeal and ordering the penalty paid by the appellant to be refunded:

(1) Looking at the statements in question objectively and in the context of which they were made, the court was of the view there was no publicity G within the meaning of the 2001 Rules and that the appellant had not breached the said Rules. The statements in the second article were not laudatory remarks within the meaning of rr 5 or 15 of the 2001 Rules but were made in the course of an extensive long interview and in response to questions about the criminal justice system and the appellant's preference H insofar as work was concerned. The appellant's views were solicited on a variety of topics including his high profile cases, the secret to victories in court, the AG's post, SUHAKAM, Batu Buruk, inquiries and conflict of interest. The court agreed with the appellant's submission that, read in that light, the references to his expertise in election law and extradition I law and mutual assistance in criminal matters could, to a large extent, fall under 'approved information' under r 2(m) and (g) of the 2001 Rules (see paras 17, 20 & 24).

(2) The fact that the statements were laudatory in itself did not automatically lead to the conclusion there was publicity within the meaning of the

2001 Rules. The statements had to be read within the context of the entirety of the articles and surrounding circumstances. The other factors which the DC and DB ought to have considered were (a) the intention of the appellant with respect to the fact of what the journalist had asked in her scope of questioning him (b) the journalist's intention as to the purpose of the interview and (c) the general message that came out from reading the articles (see para 23).

(3) The court was of the view the phrase 'in the opinion of the Bar Council' in r 15 of the 2001 Rules should not be construed narrowly. Although it was primarily for members of the Bar to decide what amounted to misconduct, as reflected in the written rules of the legal profession, and it was for the Bar Council, the DB or DC to interpret the rules, the final arbiter on the interpretation of the rules was the court. In interpreting the rules, the court would apply the objective test and place itself as far as possible as members of the Bar to determine whether there was any breach of the rules (see para 22).

(4) The High Court was right in holding that the words descriptive of the appellant in the first article were the journalist's own remarks and personal opinion. It was something the appellant could not have prevented the journalist from expressing. At any rate, there was no evidence to show the appellant had solicited the interview or that he wanted to publicise his practice or his firm. In the circumstances, the words in question could not be ascribed to the appellant as being laudatory and in contravention of r 5 of the 2001 Rules (see para 15).

[Bahasa Malaysia summary

Responden membuat aduan kepada lembaga disiplin ('LD') di bawah Akta Profesion Undang-Undang 1976 ('APU') untuk menyiasat sama ada perayu telah melanggar Kaedah-Kaedah Profesion Undang-Undang (Awam) 2001 ('Kaedah 2001') dalam satu temu bual yang diberikan kepada seorang wartawan surat khabar. Jawatankuasa disiplin ('JD') yang mana menyiasat aduan itu menyimpulkan bahawa perayu telah membuat publisiti tentang diri dan firma guamannya melanggar pelbagai peruntukan di bawah peraturan 2001 dan juga di bawah k 48 Kaedah-Kaedah Profesion Undang-Undang (Amalan dan Etika) 1978 dan perintah Majlis Peguam 2007. JD mendapati perayu bersalah atas salah laku di bawah s 94(3)(k) dan (o) APU dan menyarankan agar dia didenda sebanyak RM5,000. Apabila mendapat notis daripada LD bahawa ia telah mengesahkan keputusan JD dan mengenakan denda yang disarankan, perayu merayu ke Mahkamah Tinggi terhadap keputusan LD. Temu bual perayu telah diterbitkan dalam dua artikel, yang mana yang pertama mengandungi perkataan 'high profile lawyer', 'top lawyer' and 'people had no difficulty finding the appellant's office (which had no signboard) because of appellant's reputation'. Mahkamah Tinggi mendapati bahawa perkataan tersebut adalah perkataan wartawan dan bukannya perayu.

Artikel kedua mengandungi kenyataan yang dibuat oleh perayu, viz: 'I can tell you that whenever I am a defence counsel, the AG's Chambers always sends, without a doubt, their best team against me. This is true' dan 'I am an authority in election law and there are very few of us in this country. I am also one of the world's expert on extradition and mutual assistance cases'. Mahkamah Tinggi memutuskan kedua-dua kenyataan adalah kenyataan yang bersifat pujian oleh perayu tentang dirinya sendiri dan firma guamannya yang mana melampaui skop 'aprroved information' yang boleh dinyatakan seorang peguam cara dan peguam bela dalam satu temu bual kepada media di bawah k 2 Peraturan 2001. Mahkamah Tinggi juga memutuskan bahawa pendapat responden di bawah k 15(1)(b) Peraturan 2001 adalah pertimbangan utama setakat yang mana berkaitan dengan soalan sama ada apa yang diperkatakan dalam temu bual secara munasabah menimbulkan inferens bahawa perayu cuba untuk mempublisitikan amalannya. Dalam rayuan ini, perayu menghujahkan bahawa (a) perkataan di dalam artikel pertama bukanlah kenyatannya tetapi pendapat wartawan sendiri; dan (b) hanya menyatakan bahawa seorang pakar atau mempunyai kepakaran dalam menjawab soalan daripada wartawan bukanlah publisiti seperti perkataan 'publicise' dalam k 5 Kaedah 2001 bermaksud 'to make known to the public through any form of advertisement'; bahawa k 5 hendaklah merujuk kepada pengiklanan yang dibuat dengan tujuan publisiti; bahawa mestilah terdapat pengiklanan untuk mempromosikan jualan yang mana sedang diiklankan; perkara itu dalam kes ini tiada langsung pengiklanan. Berkaitan dengan artikel kedua, perayu mengemukakan, antara lain, bahawa LD, JD dan Mahkamah Tinggi kesemuanya gagal untuk mempertimbangkan testimoni wartawan, skop soalannya, tujuan temu bual dan pesanan am yang hendak disampaikan. Responden, sebaliknya, menghujahkan bahawa penerangan perayu terhadap dirinya sendiri sebagai pihak berkuasa dan seorang pakar adalah mencukupi untuk menjadi kenyataan bersifat pujian yang mana melanggar k 2 Kaedah 2001. Responden juga menghujahkan bahawa mahkamah sepatutnya berhati-hati dalam mencampuri dengan keputusan LD dalam rayuan ini kerana persoalan sama ada kelakuan khusus tersebut adalah tidak professional dan tidak wajar bagi seorang peguam bela dan peguam cara yang merupakan seorang ahli utama Majlis Peguam untuk memutuskan menurut standard yang diperuntukkan oleh ahli terhadap profesion tersebut.

Diputuskan, membenarkan rayuan dan memerintahkan penalti dibayar oleh perayu dikembalikan:

(1) Melihat kepada kenyataan dalam soalan secara objektif dan dalam konteks yang mana ia dibuat, mahkamah berpendapat tiada publisiti dalam maksud Kaedah 2001 dan bahawa perayu tidak melanggar Kaedah tersebut. Kenyataan di dalam artikel kedua bukanlah kenyataan bersifat pujian dalam maksud kk 5 atau 15 Kaedah 2001 tetapi dibuat dalam satu temu bual yang panjang lebar dan dalam menjawab persoalan tentang

sistem keadilan undang-undang jenayah dan keutamaan perayu setakat perkara berkaitan kerja. Pandangan perayu telah diminta dalam pelbagai topik termasuk kes berprofil tingginya, rahsia kejayaannya di dalam mahkamah, jawatan Peguam Negara, SUHAKAM, Batu Buruk, pertanyaan dan konflik kepentingan. Mahkamah bersetuju dengan hujahan perayu bahawa, dibaca secara komprehensif, rujukan kepada kepakarannya dalam undang-undang pilihan raya dan undang-undang ekstradisi dan bantuan bersama dalam perkara jenayah boleh, sebahagian besarnya, terangkum di bawah 'approved information' di bawah k 2(m) dan (g) Kaedah 2001 (lihat perenggan 17, 20 dan 24).

(2) Fakta bahawa kenyataan adalah bersifat pujian dengan sendirinya tidak secara automatik membawa kepada kesimpulan terdapat publisiti dalam maksud Kaedah 2001. Kenyataan itu hendaklah dibaca bersama dalam konteks keseluruhan artikel dan situasi sekelilingnya. Faktor lain yang mana patut dipertimbangkan oleh LD dan JD adalah (a) niat perayu sehubungan dengan fakta apa yang ditanya oleh wartawan dalam skopnya menyoal perayu (b) niat wartawan terhadap tujuan temu bual dan (c) pesanan am yang didapati daripada membaca artikel tersebut (lihat perenggan 23).

(3) Mahkamah berpendapat frasa 'in the opinion of Bar Council' dalam k 15 Kaedah 2001 tidak sepatutnya ditsafir dengan sempit. Walaupun ia adalah utamanya untuk ahli Badan Peguam untuk memutuskan apa yang terjumlah kepada salah laku, sebagaimana yang dicerminkan dalam peraturan bertulis profesion undang-undang, dan ia adalah untuk Majlis Peguam, LD atau JD untuk mentakrifkan peraturan, pemutus muktamad terhadap takrifan peraturan adalah mahkamah. Dalam mentakrifkan peraturan, mahkamah akan mengguna pakai ujian objektif dan meletakkan dirinya sendiri sejauh mungkin sebagai ahli Badan Peguam untuk menentukan sama ada terdapat apa-apa pelanggaran terhadap Kaedah itu (lihat perenggan 22).

(4) Mahkamah Tinggi adalah betul dalam memutuskan bahawa perkataan penerangan terhadap perayu dalam artikel pertama adalah kenyataan dan pendapat peribadi wartawan itu sendiri. Ia adalah sesuatu yang tidak dapat dihalang oleh perayu daripada dinyatakan oleh wartawan. Dalam apa jua keadaan, tiada keterangan untuk menunjukkan bahawa perayu meminta temubual atau dia mahu mempublisitikan amalannya atau firmanya. Dalam keadaan ini, perkataan yang dipersoalkan tidak boleh dikatakan kepada perayu sebagai bersifat pujian dan bertentangan k 5 Kaedah 2001 (lihat perenggan 15).]]]]]

Notes

For cases on misconduct, see 9 *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1807–1886.

Cases referred to

Gana Muthusamy v LM Ong & Co [1998] 3 MLJ 341; [1998] 2 MLRA 208, CA (refd)

Legislation referred to

Legal Profession Act 1976 ss 94(3)(k), (3)(o), 103E
Legal Profession (Practice and Etiquette) Rules 1978 r 48
Legal Profession (Publicity) Rules 2001 rr 2, 2(g), 2(m), 5, 5(1)(b)(vi), 15, (1)(b), (2), 24

Appeal from: Civil Suit No 17–59–11 of 2012 (High Court, Kuala Lumpur)

Muhammad Shafee Abdullah (Sarah Maalini Abhishegam and Mohd Farhan with him) (Shafee & Co) for the appellant.
Arthur Wang Ming Way (Nurufarhina bt Ab Rahim) (Arthur Wang Lian & Assoc) for the respondent.

Vernon Ong JCA:

INTRODUCTION

[1] This appeal relates to the decision of the High Court given on 10 January 2014 dismissing the appellant's appeal and upholding the decision of the disciplinary board ('the DB') dated 5 October 2012 to impose a penalty of RM5,000 on the appellant.

[2] On 23 September 2010, the Bar Council wrote to the DB complaining that the appellant appears to have breached the Legal Profession (Publicity) Rules 2001 ('the 2001 Rules'). The complaint is based on an interview given by the appellant which appear in two articles in *The Star* newspaper dated 27 September 2009.

[3] The disciplinary committee ('the DC') which conducted an inquiry into the complaint concluded that the appellant had in his interview with the journalist publicised himself and his firm of solicitors in breach of rr 2, 5(1)(b)(vi), 15(2) and 24 of the 2001 Rules, r 48 of the Legal Profession (Practice and Etiquette) Rules 1978 and Ruling 14.01(2) of the Rules and Rulings of the Bar Council 2007. The DC found the appellant guilty of misconduct contrary to ss 94(3)(k) and 94(3)(o) of the Legal Profession Act 1976 ('the LPA 1976') and recommended a fine of RM5,000 be imposed on the appellant.

[4] By a letter dated 15 October 2012, the DB informed the appellant that it had affirmed the finding of liability and recommendation on punishment by

the DC and ordered that a fine of RM5,000 be imposed on the appellant. The appellant appealed to the High Court against the decision of the DB under s 103E of the LPA 1976.

[5] The first article entitled 'Counsel Rests His Case' contained the words 'high profile lawyer', 'top lawyer' and 'people had no difficulty finding the appellant's office (which had no signboard) because of the appellant's reputation'. The learned judge found that the words in the first article were that of the journalist and not of the appellant.

[6] The second article entitled 'Keeping Within The Letter Of The Law' contained two statements which were made by the appellant. The two statements which form the subject of the complaint are:

> I can tell you that whenever I am a defence counsel, the AG Chambers always send, without a doubt, their best team against me. This is true.
>
> I am an authority in election law and there are very few of us in this country. I am also one of the world's experts on extradition and mutual assistance cases.

[7] In dismissing the appellant's appeal, the learned judge held that the two articles contained laudatory remarks and statements about the appellant and his firm which were beyond the scope of 'approved information' allowed by the 2001 Rules. The learned judge also held that the opinion of the Bar Council under r 15(1)(b) of the 2001 Rules is the primary consideration insofar as it relates to the question as to whether what was said at the interview will reasonably give rise to an inference that the appellant is attempting to publicise his practice.

SUBMISSION OF PARTIES

[8] The essence of the appellant's argument may be summarised as follows:

(a) the words contained in the first article were the journalist's own opinion;

(b) he did not publicise himself and his firm; and

(c) the two statements in the second article are not laudatory statements.

[9] On the first ground, the appellant argued that the words published in the first article were not his statements and as such he could not have been said to have advertised himself and his firm. As such, it was impossible for him to withdraw the first article.

[10] On the second ground, the appellant argued that the word 'publicise' in r 5 of the 2001 Rules means to make known to the public through any form of advertisement. As r 5 must be read and taken to refer to advertisements made

for the purposes of publicity, there must be an advertisement to promote the sale of that which is being advertised. In this instance, the appellant argued that there was no advertisement at all. Merely mentioning that one is a specialist or has expertise in answer to a question by a journalist is not publicity. The appellant also referred to numerous instances to support his argument that no action has been taken by the Bar Council against other advocates and solicitors whose practice and firms are being 'lauded' and praised.

[11] On the third ground, the appellant argued that the two statements must be read in the context of the second article as a whole. He submitted that his references to judges who had presided over his previous cases were given in a neutral, totally non-contemptuous way. The interview was to address certain public perceptions that were wrongly held and generally educational to the general public. The testimony of the journalist was wholly disregarded by the DC, DB and the learned judge. In the circumstances, the appellant's intention is relevant with respect to the fact of what the journalist had asked in her scope of questioning him, what was her purpose of the interview and what was the general message that came out from reading the article.

[12] In reply, learned counsel for the Bar Council argued that the references to previous cases and judges are irrelevant. The whole point of the 2001 Rules is simply that one cannot say that one is good. It is sufficient to show that the appellant described himself as an authority and an expert; the appellant's intention is irrelevant. The two statements are laudatory remarks uttered by the appellant. In making the statements, the appellant had allowed information beyond the scope of 'approved information' as defined under r 2 of the 2001 Rules to be publicised with regard to his practice and firm. The said rule expressly prohibits an advocate and solicitor when engaged in an interview with the press, radio or television from divulging information other than the 'approved information'.

[13] Learned counsel for the Bar Council also argued that courts must exercise caution when entertaining an appeal in which the central question is whether a particular conduct is unprofessional and cases meriting curial interference will be rare. It is primarily for the members of the Bar to decide what amounts to conduct unbecoming of an advocate and solicitor in particular circumstances, according to standards established by members of that honourable profession (*Gana Muthusamy v LM Ong & Co* [1998] 3 MLJ 341; [1998] 2 MLRA 208).

DECISION OF THE COURT

[14] Upon perusing the entirety of the two articles in question, we are inclined to agree with the appellant's argument that the statements must be

read in the context of the articles as a whole.

[15] In the first instance, we agree with the learned judge that the words describing the appellant as a top and high profile lawyer in the first article were the journalist's own remarks; as are the journalist's remarks relating to people finding the appellant's office (without any signboard) because of the appellant's reputation. We take the view that the said remarks reflected the journalist's personal opinion. It was something which the appellant could not have prevented the journalist from expressing. At any rate, we are not satisfied that there is any evidence to show that the appellant solicited the interview or that the appellant wanted to publicise his practice or his firm. In the circumstances, the words in question cannot be ascribed to the appellant as being laudatory and in contravention of r 5 of the 2001 Rules.

[16] We now turn to the two statements in the second article. We agree with the submission of the appellant that the statements in question were made with respect to the scope of the journalist's questions.

[17] It is apparent from a perusal of the second article that the appellant's views were solicited on a variety of topics including the following:

(a) SUHAKAM, Batu Buruk, inquiries and conflict of interest; and

(b) high profile cases, the secret to court victories and the AG's post.

[18] The first statement relating to the AG Chambers always sending their best team against the appellant was made in response to allegations that the appellant won his cases because of shoddy police investigations or weak prosecution. The appellant submitted that he wanted to impress upon the journalist that he did not win cases simply because his opponent played dead; but that the criminal justice system was at its best, at least in his cases. The appellant also submitted that the cases he was involved were controversial and of public interest and that the two problems did not exist. The police had investigated well and the best prosecutors were involved in all of his cases to prosecute these cases.

[19] The second statement relates to the appellant being an authority in election law and an expert on extradition and mutual assistance cases. According to the appellant, the statement was made in answer to questions about whether the judiciary was corrupt. He came up with an explanation that though it was at one time, it is no longer the case. In particular, the second statement was in response to the journalist's remarks that the appellant take on cases ranging from murder, corruption, to defending the underworld 'kings'; and to the question whether the appellant have a preference. In answer to the question, the appellant alluded to his stint as a prosecutor and to the cases

undertaken and the type of work with references to the specialised areas in which he practices including election law and extradition and mutual assistance cases.

[20] We have perused the second article and are of the view that the statements in question are not laudatory remarks within the meaning of r 5 or 15 of the 2001 Rules. The statements were made in the course of an extensive long interview and in response to questions about the criminal justice system and the appellant's preference insofar as work was concerned. We agree with the appellant's submission that read in that light, the references to his expertise in election law and extradition law and mutual assistance in criminal matters can to a large extent fall under 'approved information' under r 2(m) and 2(g) of the 2001 Rules.

[21] Disciplinary proceedings are quasi-penal in nature. The DB has the power to impose any one or more of the following penalties or punishments:

(a) to be struck off the Roll;

(b) to be suspended from practice for up to five years;

(c) to be ordered to pay a fine of up to RM50,000; or

(d) to be reprimanded or censured.

[22] In this regard, we do not think that the phrase 'in the opinion of the Bar Council' in r 15 of the 2001 Rules should be construed narrowly. As stated in *Gana Muthusamy v Tetuan Lim Ong & Co* it is primarily for the members of the Bar to decide what amounts to misconduct and this is reflected in the written rules of the legal profession. In this regard, it is for the Bar Council, the DB or DC to interpret the provisions of the rules. The final arbiter on the interpretation of the rules is the court. In interpreting the provisions of the rules, the court will apply the objective test. The court will place itself as far as possible as members of the Bar in order to determine whether there is any breach of the rules.

[23] In other words, the fact that the statements are laudatory in itself does not automatically led to the conclusion that there has been publicity within the meaning of the 2001 Rules. The statements must be read within the context of the entirety of the articles and surrounding circumstances. The other factors which the DC and DB ought to have considered are: (a) the intention of the appellant with respect to the fact of what the journalist had asked in her scope of questioning him; (b) the intention of the journalist as to the purpose of the interview; and (c) the general message that came out from reading the articles.

[24] Accordingly, looking at the statements in question objectively and in

the context of which they were made, we are of the view that there was no publicity within the meaning of the 2001 Rules. Accordingly the appellant did not breach the 2001 Rules. Therefore, the appeal is allowed. We order that the penalty paid by the appellant to be refunded. We make no order as to costs.

Appeal allowed and penalty paid by the appellant ordered to be refunded.

Reported by Ashok Kumar